

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1055

To be submitted

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1055

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES McKETHAN,

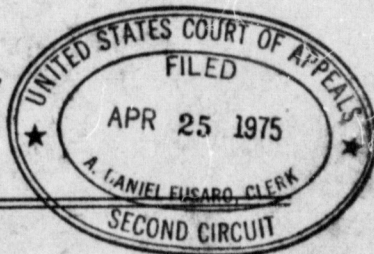
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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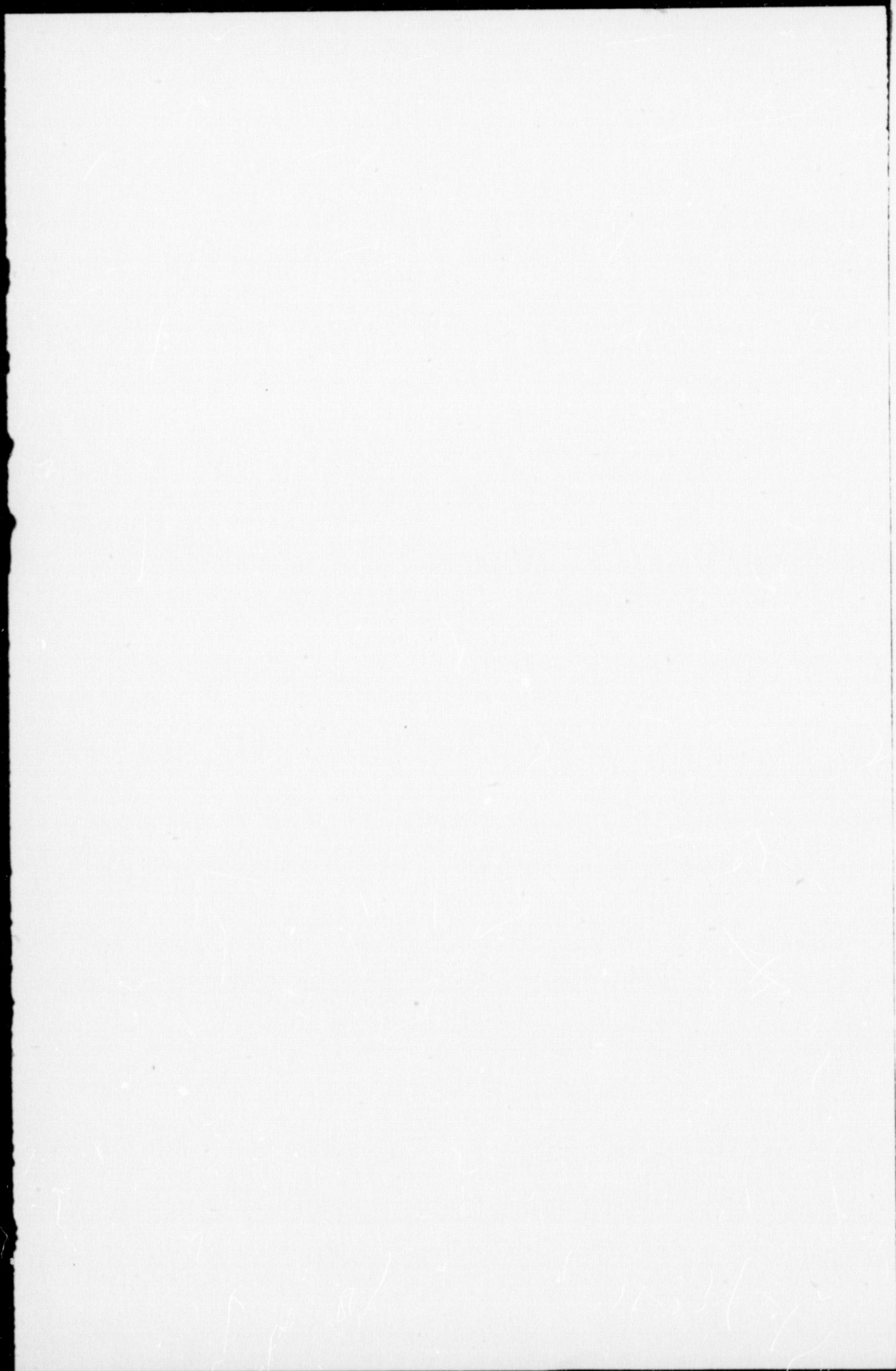


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 75-1055

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES MCKETHAN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

James McKethan appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on January 30, 1975, after a three-day trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment 74 Cr. 874, filed September 16, 1974, charged McKethan, Anthony Simon, Charles Simon, and David Stewart in Count One with conspiracy to distribute narcotics. Count Two charged McKethan, Anthony Simon, and Charles Simon with distributing and possessing with intent to distribute approximately one kilogram of heroin. Count Three charged Anthony Simon with unlawful possession of a firearm during the commission of a felony in violation of 18 U.S.C. § 924(c)(2), and Count Four charged Charles Simon with the same offense.

Trial commenced against McKethan * on December 16, 1974 and concluded on December 18, when he was found guilty on Counts One and Two. On January 30, 1975 Judge Cannella sentenced McKethan to concurrent terms of three years imprisonment on each count, followed by a special parole term of three years.

McKethan remains free on bail pending appeal.

Statement of Facts

The Government's Case

In August 1974 Special Agents Richard Scovel and Harry Barton of the Boston office of the Drug Enforcement Administration began investigating the narcotics distribution system of Anthony Simon. In the course of that investigation, a Government informant in Boston placed a telephone call in Scovel's presence to Anthony Simon in New York on August 22. The informant offered to buy 20 bundles of heroin for \$2,000. Anthony instructed the informant to rent a hotel room in Boston and to call him again once the room was obtained. (Tr. 16-20).**

On that same day, Scovel and the informant rented a room at the Madison Motor Inn in Boston and placed another call to Anthony Simon. Anthony advised the informant that his runner would come later that evening. At

* Prior to trial Charles Simon entered a plea of guilty to Counts Two and Four and was sentenced to six years imprisonment on each count, the sentences to run concurrently, followed by a special parole term of three years. Anthony Simon entered a plea of guilty to Counts Two and Three and was sentenced to seven years imprisonment on Count Two and five years on Count Three, the sentences to run concurrently, followed by a special parole term of three years. David Stewart was never arrested and remains a fugitive.

** "Tr." refers to the trial transcript; "Br." refers to appellant's brief; "A." refers to appellant's appendix.

approximately 10 P.M., David Stewart arrived at the motel room. From the motel room he placed a call to Anthony at a local Boston number and informed him that all was well. He then produced 25 bundles of heroin,* for which Scovel paid him \$2,000. (Tr. 20-22).

On August 27, 1974 the informant placed another call to Anthony Simon in New York and expressed an interest in purchasing 50 bundles. When Anthony asked for assurances that he would be paid, Scovel took the telephone and assured him that the money would be forthcoming. During a subsequent telephone conversation that same day Anthony and Scovel agreed that the sale would take place on August 28. (Tr. 26-27).

At approximately 6 A.M. on August 28, Scovel and Special Agent Barton arrived at the Howard Johnson's Motor Lodge in Dorchester, Massachusetts. David Stewart arrived at 2:15 P.M. on that day and gave the agents 51 bundles of heroin, although they only paid him for 20. When Scovel called Anthony Simon the following day, Anthony informed him that although he had purchased the heroin at a lower price, Scovel still owed him approximately \$2,300 (Tr. 27-31, 51).

On September 2, 1974 Scovel again called Anthony in New York and told him that he was interested in purchasing bulk heroin. It was agreed that they would meet in Boston on the following day. (Tr. 31).

On September 3 Scovel and Barton met Anthony at Logan Airport in Boston. The three men subsequently returned to the Howard Johnson's in Dorchester where the agents had rented a room. Anthony told the agents that he was capable of providing heroin in quantities ranging up to 5 kilograms, and estimated the price per kilogram at between \$32,000 and \$34,000. The agents expressed in-

* A bundle contains 25 bags or street doses of heroin (Tr. 22).

terest in purchasing one kilogram, and Anthony stated that a purchase of that size would have to be made in New York City. (Tr. 31-34, 52-55).

The two agents met Anthony Simon at breakfast on the morning of September 4 to complete arrangements for the purchase of the kilogram. After making a telephone call Anthony told the agents that the sale could take place at 7 P.M. in New York City, and that the price would be \$35,000 for one kilogram. The agents told Anthony that they would telephone him when they arrived in New York that evening. (Tr. 35, 55-56).

Scovel and Barton arrived in New York City at approximately 6 P.M., and Barton immediately placed a call to Anthony Simon. He told Anthony that they had not yet obtained a hotel room and would call him again when they had. The agents then went to the Skyline Motor Inn, located on Tenth Avenue near 49th Street, in Manhattan, where agents from the New York office of the Drug Enforcement Administration had established surveillance. At 7:45 P.M. Barton placed another call to Anthony's home. He told the woman who answered that he would meet Anthony in the lounge of the Skyline at 8:30 P.M. The woman replied that she would convey the message to Anthony. (Tr. 35-36, 56-57).

At approximately 8:15 P.M. McKethan and Charles Simon approached the Skyline in a 1972 Cadillac owned and driven by McKethan. The two men remained in the car for about five minutes, and then Charles Simon entered the motel. He emerged five minutes later and the two men drove off, beyond the range of the surveillance agents. (Tr. 76-78).

Anthony Simon arrived at the Skyline in a Mercedes Benz at approximately 8:50 P.M. He met Barton in the motel lounge and informed him that he did not wish to

conclude the sale at the Skyline, preferring the Van Cortlandt Motel. When Barton refused to leave the Skyline, Anthony said that he would call his brother and see if arrangements could be made to bring the heroin to the Skyline. Anthony then left the lounge and returned five minutes later; he told Barton that his brother and another man were bringing the heroin to the Skyline. In the meantime, Anthony stated, he wanted to see the \$35,000. (Tr. 58-59, 74, 79).

Barton took Anthony up to the room he had rented, where they met Scovel and Special Agent Heather Campbell. Scovel showed Anthony \$35,000 in cash and then left the room. Anthony spoke to Barton for a few minutes about the process of cutting heroin and then advised him that his brother and the other man should be arriving. At that point, he left the room. (Tr. 30-37, 59-60).

Anthony left the Skyline at approximately 9:40, and proceeded to walk back and forth along Tenth Avenue between 49th and 45th Streets. After a few minutes the Cadillac carrying McKethan and Charles Simon drove up alongside him. Anthony signaled to the car with his hand and McKethan acknowledged his signal. Anthony got into the Cadillac, which drove on several blocks until McKethan finally pulled over to the curb near the corner of 50th Street and Tenth Avenue. After he had parked the car, McKethan handed a key to Anthony Simon, who was sitting in the back seat. Anthony and Charles got out of the car and walked around to the trunk. Anthony opened the trunk and Charles reached in and removed a tan raincoat and a brown paper bag from the trunk and handed them to Anthony. Anthony wrapped the bag in the raincoat and re-entered the Skyline. (Tr. 80-83, 112-115, 129-130).

Anthony returned to the room rented by Scovel and Barton at approximately 10 P.M. He removed the paper bag from the raincoat and displayed its contents, one kilogram of heroin. He was thereupon arrested. (Tr. 60-61).

After Anthony had removed the heroin from the trunk of the Cadillac and Charles had re-entered the car, McKethan drove slowly around the vicinity of the Skyline. While he was driving, both McKethan and Charles cast continual glances through the side and rear windows. During this time McKethan pulled the car over to a curb on one occasion, turned the lights out and the motor off. Approximately a minute later he resumed driving, and drove about until he parked again on Tenth Avenue opposite the Skyline. (Tr. 82-83).

While the Cadillac was thus parked, the agents on surveillance outside the motel received word over the radio that Anthony had been arrested and that they were to arrest the occupants of the Cadillac. Agent James Greenan pulled abreast of the Cadillac in his car while still holding his microphone. When McKethan saw him, his eyes widened, his mouth opened, he shook his head and slumped slowly forward over the steering wheel. (Tr. 85). Greenan left his car and walked around to the passenger side of the Cadillac. He displayed his credentials, opened the passenger side door, and reached into the car to remove Charles Simon, who was resisting passively. As Greenan was removing Charles, McKethan stated to him, "Hell, who are you? Man, you ain't got nothing on me. Where is the stuff?" (Tr. 86-87, 102). McKethan was subsequently removed from the car by other agents and placed under arrest. (Tr. 115-116).

After the arrests McKethan was interviewed at the headquarters of the Drug Enforcement Administration by

Special Agents Michael O'Connor and Michael Powers. During the course of that interview McKethan stated that nothing had come out of his trunk that night. (Tr. 131-132).

The Defense Case

The defendant offered no evidence.

ARGUMENT

POINT I

The Government's evidence was more than sufficient on both the conspiracy and substantive counts.

McKethan raises three separate but interrelated arguments based on an alleged insufficiency of evidence: that the Government's evidence was insufficient to establish his guilt on both the conspiracy and substantive counts and that the non-hearsay evidence linking McKethan to the conspiracy was insufficient to permit admission of co-conspirators' hearsay statements. Each of these arguments is meritless. The proof adduced at trial was more than sufficient to warrant the inference that McKethan had joined in the conspiracy to sell heroin, that he knowingly participated in the attempted sale of the kilogram on the evening of September 4, and that his role was far more than that of the unwitting chauffeur he paints himself in his brief. (Br. 5, 8).

A. The sufficiency of the proof *aliunde*

We turn first to McKethan's claim that the Government's proof apart from Anthony Simon's hearsay statements was insufficient to permit admission of those statements, *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

The non-hearsay evidence established that McKethan and Charles Simon first appeared in the vicinity of the Skyline Motor Inn in McKethan's car at 8:15, precisely one half hour after Agent Barton had telephoned Anthony Simon's home and for the first time announced the location of the sale. The evidence further established that McKethan and Charles Simon remained in the vicinity for almost two hours, until their arrest at approximately 10 P.M. McKethan's activities during these two hours consisted of meeting Anthony Simon with a prearranged signal,* circling slowly around several blocks in the vicinity of the motel, parking the car for brief intervals and then resuming the slow circling. These are movements inconsistent with the behavior of someone offering a lift to a friend; they suggest not casual meetings but rather encounters prearranged and synchronized in the plan to sell narcotics which was indisputably in progress. *United States v. D'Amato*, 493 F.2d 359 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3208 (October 15, 1974); *United States v. Ruiz*, *supra*. Cf. *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).

The evidence further established beyond any question McKethan's constructive possession of the one kilogram of heroin. At approximately 9:40 P.M. on September 4, after McKethan had picked up Anthony Simon on Tenth Avenue, he was observed handing Anthony the key to his trunk. Anthony and Charles then went to the trunk and removed the kilogram of heroin. Because the car belonged to McKethan (Tr. 77) and because he apparently possessed the only key to the trunk, it is clear that he was in constructive possession of the heroin. *Arellanes v. United States*, 302 F.2d 603 (9th Cir.), *cert. denied*, 371 U.S. 930 (1962); *Eason v. United States*, 281 F.2d 818 (9th Cir. 1960). Cf.

* See *United States v. Ruiz*, 477 F.2d 918 (2d Cir.), *cert. denied*, 414 U.S. 1004 (1973).

United States v. Steward, 451 F.2d 1203, 1207 (2d Cir. 1971).

Further non-hearsay evidence of McKethan's having participated in the narcotics distribution scheme afoot that night is found in what occurred after Anthony Simon took the heroin from the trunk of McKethan's Cadillac into the Skyline Motel. Rather than leaving the scene, McKethan drove his car around the immediate vicinity, frequently looking through the side and rear windows. This conduct could fairly have been construed as establishing "... not only that he was concerned about possible police surveillance or interference from innocent passers-by, but also that the reason for any understandable concern was his own knowledge that he was illegally trafficking in ..." narcotics. *United States v. Carneglia*, 468 F.2d 1084, 1088 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973).

In addition, McKethan's awareness of and part in the offenses charged may be found in his acts and statements at the time of his arrest and thereafter. He was arrested, it will be recalled, by Agent James Greenan, who pulled abreast of McKethan's Cadillac in a Government car while still holding his radio microphone. Greenan was not wearing a uniform, nor was his car marked (Tr. 85). When McKethan saw him his eyes widened and he slumped resignedly over the steering wheel. We submit that these actions make McKethan's consciousness of guilt patent: one does not stare in astonishment and chagrin at an individual in an unmarked car carrying a microphone unless one knows (a) that the person is likely to be a law enforcement officer, and (b) that one's activities give reason to fear the presence of such a law enforcement officer.

Additional unequivocal evidence of McKethan's guilty knowledge can be found in his post-arrest statements. He stated, upon first seeing Agent Greenan, "Hell, who are you? Man, you ain't got nothing on me. Where is the

stuff?" A fair reading of these remarks suggests that McKethan and alone is substantial evidence of McKethan's Simon and not him, the agents had no case against him. His use of the word "stuff" is particularly significant because of Greenan's testimony that he had simply identified himself as a federal officer, not as a narcotics agent. (Tr. 86). The first reference to narcotics thus originated with McKethan and alone is substantial evidence of McKethan's purpose at the Skyline.

When subsequently questioned by D.E.A. agents about the events of that evening, McKethan explicitly stated that nothing had come out of the trunk of his car that night. It is, of course, settled law in this Circuit that false exculpatory statements are circumstantial evidence of guilty knowledge and have independent probative force. *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3388 (January 13, 1975); *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970); *United States v. De Alesandro*, 361 F.2d 694 (2d Cir.), *cert. denied*, 385 U.S. 842 (1966).*

Comparable cases in this Circuit establish beyond question the sufficiency of the non-hearsay evidence presented against McKethan. In *United States v. D'Amato*, *supra*, the non-hearsay proof implicating Zito was certainly no greater than that against McKethan in this case; the non-hearsay evidence against Abramo in *D'Amato* was substantially less than that against McKethan here, though similar in quality; the admission of hearsay testimony against both was affirmed. Similarly, in *United States v. Terrell*, 474 F.2d 872, 875 (2d Cir. 1973), the defendant McDonald was simply driving a car in which a drug sale was taking place; this Court held that "[p]roviding this safe haven was suf-

* Cf. *United States v. Cirillo*, 499 F.2d 872, 886 (2d Cir. 1974), in which this Court, in finding insufficient evidence of guilty knowledge or intent, noted that the defendant Gaber had not lied to the police when questioned after his arrest.

ficient to establish her active participation in the narcotics operation when coupled with guilty knowledge and presence at the scene." See also *United States v. Rizzuto*, 504 F.2d 419 (2d Cir. 1974); *United States v. Manfredi*, 488 F.2d 588, 596-7 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Marrapese*, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974); *United States v. Barrera*, 486 F.2d 333, 338 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); *United States v. Wisniewski*, 478 F.2d 274, 279-80 (2d Cir. 1973); *United States v. Ruiz*, 477 F.2d 918 (2d Cir.), *cert. denied*, 414 U.S. 1004 (1973); *United States v. Vasquez*, 429 F.2d 615, 617-19 (2d Cir. 1970).

B. The conspiracy count

McKethan's next claim, raised in Point II of his brief, is that even if the Government's evidence established his knowing participation in the attempted sale of the kilogram of heroin,* his acts were insufficient to support the jury's conclusion that he was a member of the conspiracy charged. For this proposition McKethan relies on such cases as *United States v. Reina*, 242 F.2d 302 (2d Cir.), *cert. denied*, 354 U.S. 913 (1957), and *United States v. DeNoia*, 451 F.2d 979 (2d Cir. 1971), cases which apply the so-called "single act" or "isolated transaction" rule in conspiracy cases.

The want of substance in McKethan's claim on this basis is disclosed by examination of recent authority in this Circuit which harmonizes and elucidates the line of cases on which McKethan relies. As this Court recently held in

* On this claim the statements of Anthony Simon can also be considered in weighing the sufficiency of the evidence. Significant in this regard is Anthony's statement to Agent Barton in the lounge of the Skyline at approximately 9:00 P.M., immediately after Anthony had made a telephone call, that his brother and another man would be bringing the heroin to the motel.

United States v. Torres, 503 F.2d 1120, 1123-1124 (2d Cir. 1974), the appropriate result turns on "the qualitative nature of the act or acts constituting the single transaction (purchase, delivery or the like) viewed in the context of the entire conspiracy." See also *United States v. Tramunti*, Dkt. No. 74-1550 (2d Cir., March 7, 1975) slip op. at 2149-2150. The evidence amply demonstrated McKethan's knowledge of and participation in the sale of the kilogram of heroin. That sale was not a "minor phase of a large, multiparty . . . conspiracy", *United States v. Torres*, *supra*, at 1124; it was the culminating act of the conspiracy charged and proved. Moreover, even if the evidence was insufficient on this ground, the conviction for conspiracy should be affirmed in view of the valid conviction on the substantive count. *United States v. DeNoia*, *supra*.

C. The substantive count

McKethan's claim of insufficiency on the substantive count depends on *United States v. Steward*, *supra*, but his reliance is misplaced. In that case this Court reversed the conviction of one Sands, the chauffeur for a seller of narcotics, on two grounds: first, "there is no evidence at all to show that Sands knew that illegally imported drugs were involved, and second, "there is nothing to establish that Sands exercised any dominion or control over the drugs." 451 F.2d at 1207. However, in *Steward* the Court was concerned with the sufficiency of the evidence to support Sands' conviction as an aider and abettor in violation of former 21 U.S.C. §§ 173 and 174. The reversal of Sands' conviction in *Steward* turned on the requirement of the cited sections that the Government establish an accused's knowledge that the narcotics involved were illegally imported, a burden which could be met either by proving actual knowledge or, in heroin cases, by triggering a statutory presumption of knowledge of illegal importation through a showing of the accused's actual or constructive possession of the narcotics. In *Steward*, the Court found

no proof of such possession by Sands of the heroin there involved and reversed his conviction for that reason. 475 F.2d at 1205-1207.

In this case, however, the charges were laid under the Drug Abuse Prevention and Control Act of 1970, the successor to the sections involved in *Steward*, specifically under the provisions of the Act presently codified in 21 U.S.C. §§ 841 and 846. The new narcotics law contains no requirement of proof of knowledge of illegal importation, and as a result the actual or constructive possession usually necessary to establish the guilt of an aider and abettor or conspirator under former 21 U.S.C. §§ 173 and 174—and found absent as to Sands in *Steward*—need not be shown in cases, like this one, brought under the new narcotics statutes. *United States v. Masullo*, 489 F.2d 217, 220 n.1 (2d Cir. 1973).

In any event, in the present case there is no question of McKethan's dominion and control over the drugs found lacking as to Sands in *Steward*: the heroin was in the trunk of McKethan's car, and he had the only key to it.* The inapplicability of *Steward* to the facts of this case is readily apparent in the following statement from *United States v. Terrell, supra*, 474 F.2d at 876:

"It is true that *United States v. Steward*, 451 F.2d 1203, 1206-1207 (2d Cir. 1971), held that evidence that an armed chauffeur of a car which carried a drug seller and his wares to a motel where the sale took place was not sufficient to convict the chauffeur of aiding and abetting the sale because there was no showing of the chauffeur's actual or constructive possession of the drugs. But the court there was careful to distinguish, 451 F.2d at 1207,

* As the Court pointed out in *Steward*, in contrast to this case: "The drugs were not found hidden in Sands' car, they were in the possession of *Steward*." 451 F.2d at 1207.

cases where the defendant had either exclusive, *Arelanes v. United States*, 302 F.2d 603, 607 (9th Cir.), cert. denied, 371 U.S. 930, 83 S.Ct. 294, 9 L.Ed.2d 238 (1962), or joint, *Eason v. United States*, 281 F.2d 818, 820-821 (9th Cir. 1960), control over a vehicle in which secreted drugs were found, as well as cases where delivery of the narcotics was made in an automobile over which the defendant had some control or in which he was seen with the principal seller. *Mack v. United States*, 326 F.2d 481 (8th Cir.), cert. denied, 377 U.S. 947, 84 S.Ct. 1355, 12 L.Ed. 2d 309 (1964)."

POINT II

The admission of the hearsay statements of Anthony Simon was not violative of appellant's right to confrontation secured by the Sixth Amendment.

McKethan makes a somewhat half-hearted argument that admission of Anthony Simon's out of court statements during the course and in furtherance of the narcotics conspiracy charged violated his Sixth Amendment right to confront the witnesses against him. Contrary to the intimation in McKethan's brief, the Supreme Court, albeit in *dictum*, has recently reaffirmed that admission of hearsay statements made by co-conspirators in furtherance of a conspiracy creates no Sixth Amendment problem. *Dutton v. Evans*, 400 U.S. 74, 80 (1970). Even the panel opinions in *United States v. Puco*, 476 F.2d 1099, *on hearing*, 476 F.2d 1106 (2d Cir.), cert. denied, 414 U.S. 844 (1973),*

* We respectfully submit, as we have in previous cases in which the issue has been raised, that the panel opinions for the majority in *Puco* are erroneous and, for the reasons expressed in the dissents by Chief Judge Friendly and Judges Lumbard, Hays
[Footnote continued on following page]

from which McKethan secures as much theoretical support for his claim as is available, offer him no assistance on this record. On rehearing, the majority in *Puco* held, 476 F.2d at 1107-1108:

... [W]hen a co-conspirator's out-of court statement is sought to be offered without producing him, the trial judge must determine whether, in the circumstances of the case, that statement bears sufficient reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination. . . . In most cases, the determination that a declaration is in furtherance of the conspiracy . . . will decide whether sufficient indicia of reliability were present."

Thus, even the *Puco* majority agreed that statements by a co-conspirator in furtherance of a conspiracy, which are customarily spontaneous and against the declarant's penal interest, do bear sufficient indicia of reliability to permit their admission in evidence. All of Anthony Simon's statements to the agents are properly so characterized, and thus they are plainly admissible under *Puco*. See also *United States v. D'Amato*, *supra*, 493 F.2d at 365-366; *United States v. Manfredi*, *supra*, 488 F.2d at 596. Even if, as McKethan argues, some of these statements, such as those which make reference to Anthony's "man" in New York (Tr. 54) are ambiguous, they are admissible nonetheless. In arguing for the exclusion of statements whose meaning he claims cannot be easily discerned, McKethan has confused clarity with reliability. *Puco* does not require the exclusion of statements which are unclear, only those which are unreliable.

and Timbers from the denial of rehearing and rehearing *en banc*, inconsistent with the law in this Circuit. This view appears to be confirmed by the dearth of authority since *Puco* adhering to its analysis and the codification of the settled exception to the hearsay rule for co-conspirator's statements in Rule 801(d)(2)(E) of the Federal Rules of Evidence.

POINT III

The Government's summation was not improper.

Finally, McKethan discerns an impropriety in the prosecutor's summation. During the course of that summation, the following comment was made regarding McKethan's post arrest exclamation:

"That, to me, would mean one thing and one thing only: 'I don't have the narcotics on me. You can't arrest me. The narcotics are up with Tony Simon.'" (Tr. 170).

Although no objection was raised to this remark at the time it was made, McKethan now divines in the parenthetical "to me" an improper interjection of the prosecutor's feelings, knowledge, experience and prestige. Merely to articulate that argument is to demonstrate its absurdity. Had another parenthesis been chosen, such as "I submit," it is apparent that no such argument could be seriously advanced. *United States v. Torres, supra*, 503 F.2d at 1127, McKethan's position, more plainly put, is that the injection of that two word phrase fatally taints the entirety of the Government's summation.

The failure to object to the statement precludes its being raised as an issue on appeal. *United States v. Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-9 (1940). Indeed, in *Lawn v. United States*, 355 U.S. 339, 359-360 n.15 (1958), the Supreme Court rejected a similar claim of error with respect to a prosecutorial assertion in summation beside which the one in this case was mild indeed:

"Petitioner Lawn also contends that a statement by the Government's attorney in his closing summation to the jury, saying, in pertinent part, 'We vouch for

[Roth and Lubben] because we think they are telling the truth,' deprived him of a fair trial. No objection was made to the statement at the trial. The Government's attorney did not say or insinuate that the statement was based on personal knowledge or on anything other than the testimony of those witnesses given before the jury, and therefore it was not improper . . ."

Any error here was both trivial and entirely non-prejudicial. *United States v. Hager*, 505 F.2d 737, 740 (8th Cir. 1974).

It is also worth noting that the interpretation of McKethan's remark by the prosecutor, now attacked as improper, did no more than elaborate upon a similar interpretation proffered during the defense summation:

" . . . The Government's case is Greenan and that little statement that came out where he says, 'Hell, I didn't do nothing. We have nothing. Where is the stuff? Where is the stuff?' The 'stuff' has to be junk. It has to be drugs." (Tr. 153)

Although McKethan now claims that the statement is ambiguous, his counsel seemed to have had no doubt as to its meaning during the trial.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK)

ss.:

Jeremy G. Epstein, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 25th day of April, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Paul Goldberger, Esq.
Goldberger, Feldman & Breitbart
401 Broadway
New York, New York

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Sworn to before me this

Jeremy G. Epstein

25th day of April, 1975

Jeanette Ann Grayeb
JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977